

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA REGISTRY

AT IRINGA

LAND APPEAL NO. 01 OF 2023

*(Originating from Land Application No. 176 of 2021 in the District Land and
Housing Tribunal for Iringa at Iringa)*

THE REGISTERED TRUSTEES OF CAMALDOLES.

NUNS OF MAFINGA @ KAMALDOLESI SISTERS..... APPELLANT

VERSUS

**CLAY MWITULA (THE LEGAL REPRESENTATIVE
OF THE FAMILY OF THE LATE ENOS
VANGISIMU MWITULA).....**

1ST RESPONDENT

SEVERIN KITOSI.....2ND RESPONDENT

JUDGMENT

Date of Last Order: 15.06.2023

Date of Judgment: 14.07.2023

A.E. Mwipopo, J.

The Registered Trustees of Camaldoles Nuns of Mafinga @ Kamaldolesi Sisters, the appellant, appeal against the decision of the District Land and Housing Tribunal for Iringa at Iringa (DLHT) in Application No. 176 of 2021. The origin of the dispute is Application No. 50

of 2014 in the DLHT between Clay Mwitula, the 1st respondent, as administrator of the estates of the late Enos Vangasimu Mwitula and Sevelina Kitosi, the 2nd respondent. The 1st respondent sued the 2nd respondent for trespassing on 600 acres of land. The DLHT decided in favour of the 1st respondent. The 2nd respondent was not satisfied and filed Land Appeal No. 07 of 2018 in this Court, which was dismissed for want of merits, and the DLHT decision was upheld. The 1st respondent filed Misc. Application No. 97 of 2020 for execution of DLHT decision. The appellant instituted Misc. Application 28 of 2021 in the DLHT objecting to the execution in Misc. Application No. 97 of 2020 which was initiated by the 1st respondent on the ground that the appellant owns part of the land in dispute. The objection proceedings were struck out for incompetence following the preliminary objection raised, and the DLHT completed the execution process.

As the appellant had no right of appeal after his objection proceedings were struck out for incompetence, he filed Application No. 176 of 2021 in the DLHT, suing the 1st and 2nd respondents for the ownership of 150 acres in the suit land. The counsel for the 1st respondent raised preliminary objection (P.O.) on two points of law. The 1st point is that the

appellant has sued 1st respondent, who is the wrong party. The 2nd point is that the case is res judicata. The DLHT heard submissions from both sides and dismissed the case on the 2nd point of P.O. that the matter is res judicata. The DLHT did not determine the 1st point of P.O. The appellant was dissatisfied and filed the present appeal.

The memorandum of appeal filed by the appellant contains two grounds of appeal as follows hereunder:-

- 1. The trial Tribunal erred in law and facts by declaring that the Application was res judicata.*
- 2. The trial Tribunal erred in law and facts by not deciding on the first preliminary objection raised by the 1st respondent, which led to the continuous contradiction between the parties.*

When the case was coming for hearing, both parties were present in Court. The appellant had legal representation from advocate Marco Kisakali, whereas advocate Raymond Byambolirwa represented the 1st respondent. The 2nd respondent had no representation of the legal counsel. Hearing of the case proceeded orally.

The counsel for the appellant said in his submission for the 1st ground of appeal that the DLHT did not consider section 9 of the Civil Procedure Code Act, Cap. 33 R. E. 2019, (CPC Act), when deciding that the

Application before it was res judicata. The section provides four factors that must be considered for the case to be res judicata. In the case of **Registered Trustees of Chama cha Mapinduzi vs. Mohamed Ibrahim Yusi and Sons & Another**, Civil Appeal No. 16 of 2008 Court of Appeal of Tanzania at Zanzibar, (unreported), on page 8, the conditions for the plea of res judicata to operate were stated.

The first condition is parties in the previous suits must be the parties in the present case. In Application No. 50 of 2014 before DLHT, the parties were the 2nd and 1st respondents. In this application, the parties are the Registered Trustees of Camaldolese Nuns of Mafinga Camaldolese @ Kamaldolisi Sisters against Clay Mwitula and Severina Kitosi. The DLHT did not consider the factor that the parties differ in these two cases.

The second factor to be considered is the identity of the subject matter in the issue, or the cause of action had to be the same. The DLHT, in its decision, found the subject matter was the same. However, the subject matter in these two cases differed from the present case. The land in dispute is at Kising'a ward in Kilolo District, while the land in conflict in the previous case was at Ukwega ward in Kilolo District. It is clear that the land in dispute was different.

The third factor to be considered is whether the party in the subsequent suit is litigating under the same title. In this suit, the dispute is between the Registered Trustees of Kamaldolese Nuns of Mafinga @ Kamaldolese Sisters, Clay Mwitula and Severina Kitosi, while in the previous case, the parties were Clay Mwitula and Severina Kitosi. The subject matter is also different. In the previous case, the size of the land was 600 acres, but in the subsequent suit, the size was 150 acres. Thus, it was wrong to say the subsequent suit is res judicata. The said factors have to be considered cumulatively. The former suit must be heard and finally decided by a competent Court with Jurisdiction.

The counsel went on to say that the chairman of DLHT in this matter relied on the decision of the Tribunal without considering that the appellant was not a party. After the appellant heard that the respondents had a case and they were executing the decree of the Court in the Execution Case No. 96 of 2020 in the DLHT, he filed objection proceedings which were registered as Misc. Application 28 of 2021 in the same DLHT. The DLHT dismissed the objection proceedings on the ground that the DLHT has no jurisdiction to go against the decision of the High Court made in the appeal. The only remedy where objection proceedings are unsuccessful is

to file a fresh suit over disputed land. The appellant has no right to appeal against the decision of the DLHT in the objection proceedings under order XXI rule 62 of the CPC Act. The same was stated in the case of **NHC vs. Peter Kassidi and four others**, Civil Application No 294/16 of 2017, Court of Appeal of Tanzania at Dar Es Salaam (unreported) on page 9.

In this case, the only remedy for the appellant was to institute a fresh suit to establish the ownership of the disputed land. It was wrong for the trial DLHT to dismiss the Application for being res judicata as it did. The counsel relied upon the position in **Judith George Nyembela vs. Edgar Herman Begere**, Civil Revision No 33 of 2021, High Court Dar Es Salaam registry at Dar Es Salaam (unreported) on pages 11 and 12.

On the 2nd ground of the appeal, it was the appellant's submission that the 2nd respondent raised a Preliminary objection in the DLHT that the appellant had sued the wrong party. The DLHT did not determine this Preliminary objection. As a result, it led to continuous contradictions. The 2nd respondent said she was not a proper party in the case. The DLHT could have seen that the parties were different. It could have decided the said preliminary objection raised by the 2nd respondent without uncertainty.

The counsel for the 1st respondent replied to each ground of appeal as submitted by the counsel for the appellant. On the 1st ground of appeal, he said that the DLHT, in its ruling, properly determined the preliminary objection after considering the Application No. 50 of 2014, Appeal No. 07 of 2018 at the High Court, and Misc. Application No. 28 of 2021 before DLHT. This Application (Application No 176 of 2021) at DLHT was res judicata. The conditions stated in section 9 of the CPC Act do not need all requirements to be there before the Court decided that the matter was res judicata. In this case, the land in dispute is the same. DLHT has already determined the dispute on merits. What the appellant did was change the size of the land. The DLHT held in its ruling on page 2 of the Application No. 176 of 2021 that the land in dispute is the same in all three cases.

The appellant was not a party in Application No. 50 of 2014 before DLHT and Land Appeal No. 07 of 2018 before this Court. In Misc. Application No. 28 of 2021 before DLHT, the parties were the same. It proves the parties and the subject matter in subsequent and former suits were the same. In **Kamage & Others vs. The Pioneer General Assurance Society LTD [1971] E. A 263**, the defunct Court of East Africa prohibited the parties from instituting endless suits on the same

subject matter already determined by the Court of competent jurisdiction. The purpose of the res judicata principle is to guarantee the finality of litigation as stated by the Court of Appeal in the case of **Peniel Luther vs Tanaki and others [2003] TLR 312**. The Application No. 176 of 2021 before the DLHT was res judicata, and the trial DLHT was correct in its ruling to find that the Application was res judicata.

Regarding the second ground of appeal, the counsel informed the Court that he would not submit the determination of the 2nd point of the P.O. as the issue of preliminary objection was not considered by the trial DLHT. After the DLHT found that the issue of res judicata disposed of the matter, it did not determine the 2nd point of the preliminary objection raised by the 2nd respondent.

The 2nd respondent, a layperson, had nothing to say on the appeal. She left the matter to the Court to do justice to her.

In his rejoinder, the counsel for the appellant stated that the counsel for 1st respondent has admitted that the appellant was not part of the Application No. 50 of 2014 at DLHT and Appeal No. 07 of 2018 in the High Court. The appellant was indeed part of Misc. Application No 28 of 2021 which is objection proceedings against execution application. The appellant

being part of objection proceedings, it does not make the subsequent suit res judicata. After his objection proceeding was dismissed, the remedy to the appellant was to file a fresh suit. The principle stated in the case of **Kamuya and others vs. the Pioneer General assurance society LTD**, [supra] that the Court has to discourage multiplicity of suits and guarantee that the finality of litigation does not apply where one of the parties to the subsequent case was not a party to the former suit.

From the rivalry submissions, the issue for determination is whether the appeal has merits.

There is no dispute that the trial District Land and Housing Tribunal for Iringa District at Iringa dismissed Application No. 176 of 2021 filed by the appellant for being res judicata. As both counsels rightly submitted, the doctrine of res judicata is provided under section 9 of the Civil Procedure Code Act, Cap. 33 R.E. 2019. The doctrine prohibits a court of law from entertaining a matter that has already been decided by a competent court between the same parties regarding the same subject matter. Section 9 of the Civil Procedure Code, Cap. 33 R. E. 2019, provides conditions for the res-judicata principle to apply. The requirements include that the former suit must have been between the same litigating parties or between parties

under whom they or any of them claim; the subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit; the party in the subsequent suit must have been prosecuted under the same title in the former suit; the Court which decided the former suit must have been competent to try the suit; and the matter in issue must have been heard and finally decided in the former suit. The position was stated by the Court of Appeal in several cases, including the case of **Esterignas Luambano vs. Adriano Gedam Kipalile**, Civil Appeal No. 91 of 2014, Court of Appeal of Tanzania at Zanzibar, (unreported); **The Registered Trustees of Chama cha Mapinduzi vs. Mohamed Ibrahim Versi and Sons and Another**, Civil Appeal No. 16 of 2008, Court of Appeal of Tanzania at Zanzibar, (unreported); and **Peniel Lotta v. Gabriel Tanaki and Others (2003) TLR 312**.

The reason stated by the trial Court to decide that the Application No. 176 of 2021 is res judicata is the fact that a similar dispute has already been determined by the DLHT in Application No. 50 of 2014, in Land Appeal No. 07 of 2018 in the High Court of Tanzania at Iringa and in Misc. Application No. 28 of 2021 in the DLHT, which was objection proceedings.

The trial Chairman was of the view that the relief sought by the appellant to be declared the owner of the land in dispute could not be granted as the High Court in the appeal case has declared the 1st respondent to be the rightful owner of the suit land and execution has been absolute since 03.02.2021.

Having read Application No. 50 of 2014 in the DLHT which is the original suit in this dispute, it is clear that the parties were 1st and 2nd respondents. The 2nd respondent sued the 1st respondent for the ownership of the suit land, and the suit was dismissed for want of merits. The 2nd respondent unsuccessfully filed Land Appeal No. 07 of 2018, which was dismissed for wants of merits. In these two cases, the appellant was not a party. The 1st respondent filed Misc. Application No. 96 of 2020 for execution of the decree of the DLHT in Application No. 50 of 2014. The appellant filed Misc. Application No. 28 of 2021, which is objection proceedings. The appellant was objecting to the execution of the part of the decree on the ground that she is the rightful owner of 20.76 acres which is part of the land subject of execution. The objection proceeding was struck out because the execution was absolute, and there was the judgment of the High Court on the matter. In the objection proceedings,

the appellant was party to the suit for the first time. After the objection proceedings were struck out, the appellant filed Application No. 2021 in the DLHT seeking the order of the Tribunal declaring her the owner of 20.76 acres of pine trees and 129.24 acres, making the total claim 150 acres. The appellant was not a party to Application No. 50 of 2014 in the DLHT, and the Appeal No. 07 of 2018 in the High Court, which determined the ownership of the suit land. The appellant claims ownership of the part of the suit land in Application No. 50 of 2014 in the DLHT and Land Appeal No. 07 of 2018 in the High Court. For that reason, it is clear that the parties to the former suit (Application No. 50 of 2014 and Land Appeal No. 07 of 2018) were not the same, and the size of the suit was different. This was sufficient to prove that the matter was not res judicata.

On the Misc. Application No. 28 of 2021, which the appellant instituted against respondents, the suit was an objection proceeding where the appellant was objecting to the execution of 20.76 acres as part of the suit land as the same belongs to her. The objection proceedings were struck out for being overtaken by the event as the execution had already been absolute. Order XXI rule 62 of the Civil Procedure Code Act, Cap. 33 R.E. 2019 curtails the unsuccessful party's right of appeal or revision. The

only remedy for the aggrieved party was to file a suit in the same Court to establish the objection to the property claim in dispute. The Court of Appeal stated the position in the case of **Truck Freight (T) Ltd vs. CRDB Bank Ltd**, Civil Appeal No. No. 128 of 2006, Court of Appeal of Tanzania, (unreported); **Sosthenes Bruno and Another vs. Flora Shauri**, Civil Appeal No. 249 of 2020, Court of Appeal of Tanzania at Dar Es Salaam, (unreported).

The Court of Appeal sitting at Dar Es Salaam in the case of **Bank of Tanzania vs. Devlam P. Valambhia**, Civil Appeal No. 15 of 2002, (unreported), held that:-

"..... It is abundantly clear to me that there is no right of appeal to the Court once an objection to the attachment has been adjudicated upon. The remedy open to the objector is to file a suit to establish the objection to the claim of the property in dispute."

In **National Housing Corporation vs. Peter Kassidi and 4 Others**, (supra), it was held on page 8 of the judgment that:-

"....., we take it to be firmly established law that, pursuant to Order XXI Rule 57(1) of the CPC, where an objection is preferred, and an order determining that objection is subsequently made, in terms of Rule 62 of the same Order, the only remedy available to the party against whom that order is made is to institute a regular suit to

prove his claim. Put in other words, after the decision on an objection proceeding has been made by a competent court, there is no remedy for appeal or revision. The rationale behind the above-stated stance of the law is not farfetched. We hope that it will be immediately appreciated even by the doubting Thomases that, not emanating from a suit, an order determining objection proceedings is not appealable.”

This Court in the case of **Rosebay Elton Kwakabuli v. Aziza Selemani and 2 Others**, Land case No. 57 of 2019, High Court Land Division, (unreported), while discussing the remedy for the prohibition under Order XX1 rule 62 of the Civil Procedure Code Act held that:-

“To file a fresh suit to establish one’s title contemplated in the circumstances of the above provision entails suing on the same subject matter pursued in the objection proceedings and against all the parties involved preferably in the same Court that heard the original suit and objection proceedings.”

It is evident from the above cited provision of the law and cases that the remedy to the aggrieved party where the objection proceedings have been determined conclusively is to file a fresh suit to prove its claim. The suit has to be filed in the same Court that determined the original suit and objection proceedings. It was a misdirection on the part of the trial Chairman of the Iringa DLHT in Application No. 176 of 2021 to dismiss the

matter for being res judicata. The Application was properly filed at the Tribunal.

For that reason, the appeal has merits, and it is allowed. The decision of the District Land and Housing Tribunal for Iringa District at Iringa is quashed, and the drawn order is set aside. The file is reverted to the trial District Land and Housing Tribunal and the trial of the Application No. 176 of 2021 to start afresh before another Chairman. As I have ordered for the trial to start afresh in the DLHT, each party is to bear his own costs of this suit. It is so ordered accordingly.



A handwritten signature in blue ink, appearing to read "A.E. Mwiipo".

A.E. MWIPOPO

JUDGE

14/07/2023